THE NOTION OF CRIMINAL INTENT: THE EVOLUTION OF MENS REA IN CRIMINAL LAW

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Abstract

This thesis evaluates the legal concept of *mens rea* to better understand its meaning and significance in criminal law. Included in this is the examination of the evolution of criminal law from Roman law to today's Canadian criminal law, through the lens of the foundation principle of *mens rea,* through its application in numerous Supreme Court of Canada cases, has either reinforced the interpretation of laws or set out a new framework on how the law should be interpreted. The purpose of this paper is to illustrate how *mens rea* guided criminal law by emphasizing the purpose of the justice system, the purpose and significance of the mental element within an offence; how the law is interpreted using the concept of *mens rea*; the degree of culpability within each offence; and a higher standard of burden of proof. *Mens rea* has many functions such as to guard against the wrongful conviction of morally innocent individuals and to protect our society from those who caused harm. *Mens rea* also helps distinguish between the degrees of moral blameworthiness within each crime and to understand the concept of burden of proof. Lastly, *mens rea* is critical in a court's determining of an appropriate punishment. Finally, this thesis links the concept of *mens rea* to legal defences in criminal law.

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In Canadian criminal law, there is a great deal of emphasis on the wrongful conductof an offender yet the most important and foundational concept in criminal law lies within the mental element of a crime. For many centuries, criminal law stood by the maxim of "*actus non facit reum nisi mens sit rea",* meaning that a person cannot be convicted of a crime without proof of criminal act and intent to commit the act. Therefore, law relies on both the act and the mental element. To better understand the purpose of criminal law and how it is interpreted, this paper examines the meaning of *mens rea* and its role in criminal law. By dissecting each concept of *mens rea* and evaluating its application in Supreme Court cases, we will be able to distinguish between the different requirements of *mens rea* in different offences and the different defences that apply to these offences. There is a great deal of emphasis on the concept of *mens rea* and how it is interpreted in criminal law. For centuries, we have witnessed many changes to criminal law except for its main structural principles; *actus reus, mens rea*, presumption of innocence, and proof beyond a reasonable doubt. These principles guided the interpretation and application of criminal law in our courts and will continue to do so for as long as law exists.

Purpose of *Mens Rea*

Surely men rea has been around for centuries and is foundational to the principles of criminal law, however it is not sufficient to support a criminal conviction by establishing the fault element or the "guilty mind" for the reason that guilt rests not only on intent, but on other elements as well (Chan & Simester, 2011, p. 382). We do not want to derail from the conventional function of *mens rea* in criminal law, the one of culpability, although we should look into the role of *mens rea* in other functions of an offence. The primary function of *mens rea* is to prevent the conviction of a morally innocent individuals who do not possess the knowledge or the understanding of the consequences of their actions. It is crucial in Canadian criminal law to prove the presence of *mens rea* mental elements suggesting that the defendant had a guilty mind when committing the offense

(Verdun-Jones, 2007, p. 68). It is easier to understand *mens rea* and its function when looking at it as a consequence of the prohibited *actus reus* (act). Therefore, a person that commits a prohibited act, must be aware of the consequence and possess a guilty mind, or they will not be considered morally blameworthy (Verdun-Jones, 2007, p. 68), thus the first function of *mens rea* is to determine the moral innocence or moral guilt of the individual.

In itself, *mens rea* is incomplete as it only purports to show if the defendant had the intent or a guilty mind at the time of the offense. There are many factors that contribute significantly to the role of determination of guilt or innocence of a person. The various *mens rea* terms that are used in the criminal law serve to adequately reflect the distinction between different degrees of moral culpability that a defendant holds and the stigma that is attached to a particular offence.

Another important function of *mens rea* is to distinguish between the different degrees of *mens rea*, moral blameworthiness and the offences to which a certain degree of *mens rea* applies to. In criminal law, blame comes with an act that has been determined to be morally wrong. Thus, if an action was wrong, it doesn't always mean that the defendant is culpable, as they may be lacking *mens rea* or have a justification in accordance to this particular offense. However, one may also be blameless (not culpable for their action) as one's conduct was not wrongful in the first place (Chan & Simester, 2011, p. 385). Within categories involving cases that carry out blame, *mens rea* is crucial in aiding courts to determine which punishment would be in accordance with the degree of blameworthiness of a particular conduct/action (Brown, 2012 p. 115). There are different requirements of *mens rea* for each particular offense that the courts must account for. Because one cannot carry the same degree of blameworthiness of a murder when he/she had broken into someone else's private property, these offences carry with them a different requirement of *mens rea* which determines the degree of culpability and blameworthiness that is attached to the offense. As the old Rule of Law has taught us "a punishment must fit the crime" which is why we

have different degrees of culpability with different levels of blame that carry out a different punishment (Brown, 2012, p. 117).

The following function of *mens rea* is articulating and notifying the limits of citizen's freedom (Chan & Simester, 2011, p. 382). Suggesting that criminal punishment serves as an example to the public to demonstrate that with each action comes consequence, whether it is good or bad. Each one of those consequences vary from the degree of their action, in other terms, a punishment must fit the crime. Ultimately, those consequences limit a person's freedom by restricting some behaviours that are considered morally wrong by the society and the law. With such actions, come consequences that a person must endure as a responsibility for their morally wrong behaviour. A reasonable person knows what constitutes morally wrong and will conform to the rules that the society and the law had put in place. By limiting some of citizen's freedoms, and by articulating what is a guilty mind and notifying them that this guilty mind leads to certain action that ultimately brings consequences, we are able to control behaviors and prevent criminal activity.

However, *mens rea* is a very complex element and even in certain circumstances it is hard to establish a level of blameworthiness that an act may carry with it. It is why it is important to keep in mind other intervening factors in the process of determination of the fault element. There are numerous requirements that we must consider in order to correctly assess the mental component of *mens rea*, and each of those requirements vary with each offence. As we know, each offence's harm is proportionate to the punishment attached to the offence. In this way, *mens rea* serves to help the courts establish a balance between the blame that is carried out by the action (Brown, 2012, p. 115). In other terms, the greater the culpability, the harsher the punishment. A relevant example would be the difference between manslaughter and first degree murder. Both are cases of a person causing death to another. However, one has a greater culpability than the other,

hence the stricter punishment. The difference between the two is the mental element or lack of thereof. In manslaughter, a person engages in an unlawful act that results in an unintentional death of another person. Meanwhile, a first degree murder accounts for a deliberately premeditated killing of another person. Meaning that the person had wilfully planned to cause death of another person. That deliberate premeditation is the key difference between the two. Manslaughter still holds a great degree of culpability and a strict punishment of a maximum of life imprisonment, while first degree murder holds one of the few offences with the highest degree of culpability and the harshest punishment of life imprisonment. The *mens rea* or mental element is crucial in each offence even in cases where the act may be of a similar nature, but the mental element is distinctive and exclusive from each person and each offence.

The last but not least important function of *mens rea* in criminal law is the protection of potential victims and the preservation of liberties for potential defendants (Chan & Simester, 2011, p. 382). Wrongfully convicting an innocent person has always been the biggest fear of our justice system. If we do not properly assess the mental element of the defendant in relation to the conduct for which they have been accused of engaging in, we risk of erroneously incarcerating an innocent person. It is why it is crucial to properly assess every element of *mens rea* to avoid making mistakes that would violate a person's rights and freedoms. A mistake that takes away a person's liberty by being incarcerated for even one day. That is why a correct interpretation and assessment of *mens rea* in Court is so important.

Historical Overview in the Development of Mens Rea

In order to fully understand the upbringing of the concept of *mens rea* in to our justice system and criminal law we must observe two very important influences of the twelfth century. The *mens rea* requirement has been introduced to English common law by Roman canon law in early twelfth century. An English clerk and jurist named Henry de Bracton, also known for his

writing of *De Legibus et Consuetudinibus Angliae* ("On the Laws and Customs of England") had a tremendous influence on Criminal Law with his ideology in regard to *mens rea*. Bracton seems to have put the final seal of acceptance upon the mental element in English criminal law. The period subsequent to Bracton showed clearly the transition from the primitive liability concept, to one of general moral blameworthiness (Chesney, 1939, p. 632). This transition put an emphasis on the role of *mens rea* in different types of crimes such as murder, robbery, larceny, or homicide, which were common in thirteenth century. Throughout centuries, the understanding of the necessary *mens rea* for criminality was very vague. Although, one fact was clear, that since each crime involved different social and public interests, thus the mental requisites for criminality in one must differ from the other (Chesney, 1939, p. 634).

The development of different requirements for each offence have come into effect, criminal offences such as; homicide where there was division between two type of homicide, one with or without 'malice aforethought' that was required to prove that the accused had committed the offence, had knowledge of the consequences of his actions, and had the intent to commit the act regardless of the prohibition of the law. More laws have developed such requirements, such as arson, burglary and larceny, which all required the concept of intent to commit the act that had to be proved in Court. Along with those mental intent requirements came the defence concepts for each offense (Chesney, 1939, p. 639). These requirements were in place to carefully assess a person's state of mind to determine the level of blameworthiness and fault that is carries with their action. The absence of *mens rea* is ultimately the absence of blame and fault of, therefore carries no guilt, thus considered innocent.

Roman Law

Today, the legal interpretation of the law has become the main function of the courts. During the period of Roman law, the interpretation of the law fell into the hands of the priests,

meaning there were no legally trained judges that could contribute to the development of the law (Anderson, 2009, p. 11). However, during the Republic, a class of legal experts had emerged, called jurists. Jurists were comprised of a group of men from the upper class who made it their duty to practice law as a contribution to the public life (Anderson, 2009, p. 12). It is important to note that a jurist's job was not to represent a party in Court, which actually was part of the job of an oratory expert, but to actually write laws that would serve their public (Anderson, 2009, p. 12). A jurist's role falls into three main categories: the first is to provide the public, the judge, and private parties with legal advice, the second role was as legal writers who wrote numerous legal articles that are known to us today, and lastly, they were teachers or apprentices to some students (Anderson, 2009, p. 13). Another important character in the development of the Roman law was the praetor. The praetor was responsible to hearing the legal advices and suggestions before they are being brought up by the jurists before the judge. All these roles were the very first roles of what we call today a Courthouse.

Canon Law

Canon law was part of the Roman law that was formed within the Roman Catholic Church. In the Medieval period, the Roman Catholic Church had jurisdiction over a variety of areas of law such as marriage and wills (Anderson, 2009, p. 112). The basis of Canon law consisted of the canons of the church who would lay down the rules, scriptures and the works of the fathers of Church (Anderson, 2009, p. 112). When a case relating to either marriage or wills is being presented, these matters are not being overlooked by the courts, but rather being presented in front of the Church. The importance of Canon law for present purposes lies in its use of Roman law as a subsidiary source where this did not conflict with Church teachings (Anderson, 2009, p. 112). This being said, there was a nexus between Roman law and its rules and the rule of the Church. There had to be an agreement set out in certain areas.

Legal Definition of *Mens Rea*

For each criminal offense, there are two main elements required by the courts and the justice system to convict an individual of a crime; *actus reus* and *mens rea*. *Actus reus* being the element of the action itself and *mens rea* being the fault element. However, the confusion about *mens rea* continues as the Parliament fails to incorporate a specific meaning and requirement of *mens rea* within each offense. It is still unclear whether the fault element can be interpreted as "purposely", "knowingly", "recklessly", or "negligently" (Roach, 2015, p.169) nor did they specify which particular fault element is applied to which criminal offense. Consequently, the question still remains: "what is the true meaning of *mens rea* in criminal law"? As it appears to be an important concept in underlying the principles of fundamental justice, it must be properly defined and applied by the law (Stuart, 2007, p.163). The principles of fundamental justice require *mens rea* that would reflect the specific nature of a crime, whether it holds a stronger stigma or not. For instance, a murder is a crime for which the society holds a significant stigma against due to the severity of the crime itself. Hence why murder holds a more extreme punishment from manslaughter, even though both are actions resulting in death of another person. The mental element necessary to distinguish between a culpable homicide and a manslaughter is what gives rise to the moral blameworthiness that justifies the stigma and punishment attached to murder (Skolnik, 2017, p. 335). As per Stuart (2007), in order to understand the fault requirements, and the concepts of moral blameworthiness that is attached to *mens rea*, it is important to consider the two classifications of *mens rea*; subjective and objective distinctions.

Two Categories of *Mens Rea*

An individual is considered morally innocent when they did not possess the necessary *mens rea* element for the offense they have committed. As mentioned previously, one of *mens rea* functions is to prevent the incarceration of the innocent. In order to do that the courts must fully

understand the crime itself and the mental state of the defendant whilst committing the offence. There are two major categories that divide the crimes and the mental element associated to the crime. To correctly classify the crime and the necessary mental element associated with the crime, it is crucial to recognize, understand, and apply these two types of *mens rea* requirements; the subjective liability and the objective liability to the crime.

Subjective Liability

The subjective liability in *mens rea* tends to focus on the individual's awareness of the actions. In other terms, what the accused actually knew, intended, or adverted to rather than what the accused should have known in the given circumstances (Skolnik, 2017). This means that the person had foresight of their actions and knew the risks and consequences of their actions but made a 'reprehensible choice' of continuing the act (Birch, 1988). In more detail, the defendant's blame rests upon a number of possible mental states with regard to the circumstances or consequences surrounding his conduct. Most importantly, subjective *mens rea* operates in a manner that prevents the conviction of the morally innocent by determining the state of mind of a person and protect those who have an impaired reasoning or lack of thought to recognize what they are doing (Roach, 2015, p. 173).

According to Amirthalingam, (2004), *mens rea* is presently treated as a unitary concept meaning it is "wholly subservient to subjectivism" and he proposed that we divide the term "*mens rea*" into two individualistic words. In this dual model, *mens i*s the subjective mental element that attributes responsibility for the conduct and consequence for the accused. And the "rea" is the normative evaluation of that mental element such as; moral blameworthiness of the accused. This would mean that we now have to ask whether the "*mens*" was "rea" rather than to only focus on the presence of "*mens rea*" as a whole (p. 496).

There are four different levels of a person's state of mind that correspond to their action, the most culpable is "intention" of their actions. A great example was used by Stannard, (1985) to illustrate the escalation of one action in all four states of mind (p. 541). The first state of "intention" is divided into two categories; a "direct" intent or an oblique "intent". A "direct" intent also known as 'specific intent' refers to when a person's wrongful conduct/ action was committed intentionally, and a consequence has followed. The best example to illustrate the meaning of "specific" intent was the one of a man throwing a stone with the intent and for the purpose of breaking a window.

In the instance of "oblique" intent or 'general intent', the person would throw a stone not for the specific purpose of breaking a window but knowing that there is a high likelihood and it is inevitable for the stone to hit and break the window. Following "intention" is "recklessness", in which a person if fully aware of the possible consequences but decides (without justification) to pursue with their action. In this case, the determining factor is knowledge of their action and consequence. For instance, if the person throws the stone and knows that it will hit the window behind, he is being reckless.

The major distinction between a specific intent and recklessness or negligence is the element of knowledge. To prove a person's intent, the Court must show that the individual knew and had foreseen the consequences. Thus, why the main principle of *mens rea* is the presence of intent which is identified by a person's knowledge and awareness of relevant circumstances and consequences of his conduct. Furthermore, as Stannard, (1985) then evaluates the draft Criminal Code in which it is stated that "Unless a contrary intention appears, a person does not commit a Code offense unless he acts intentionally, knowingly or recklessly in respect of each of its elements other than fault element" (p.543), reinforcing the importance of intent and knowledge of a person's own conduct in order to carry the blame and culpability for their conduct.

Specific Intent. In specific intent offenses, evidence is required that the accused committed the wrongful conduct to bring upon another specific outcome or in other words that requires an ulterior motive. Those offenses may be designated in the Criminal Code with the use of words such as 'for the purpose of', or 'with intent to' to 'means to cause' in the description of the specific offense. In order to rightfully and correctly prove specific intent offences the Court must look at the degree of mental element that was present during the omission of the wrongful act. Specific intent requires a much-sophisticated mental element for a person to commit the offence. The importance that refers to the complexity of a significant thought and reasoning process that makes up the mental element of a particular offence (*R. v. Tatton*, 2015, para 34).

The Queen v. George [1960]. Specific intent has received other labels of classification such as "ulterior", "further", and "specific" (Stuart, 2007, p. 250). A major case that attempted to define specific intent in Canada was that one of *George (*1960), where the defendant was charged under s. 288 of the Criminal Code with robbery with violence and was later acquitted for the reason of being incapable of forming specific intent to commit a robbery when severely intoxicated (*The Queen v. George*, 1960, para. 2). With respect to theft and robbery, specific intent must be proven, and in this particular case, the Court held that the defendant did not have the necessary mental element to be charged with robbery. However, with respect to common assault, no degree of intent is necessary as long as there is proof that the act itself has been committed (*The Queen v. George*, 1960, para. 5). As Justice Fauteux stated in his decision when considering *mens rea*, "a distinction between (i) intention as applied to acts considered in relation to their purpose and (ii) intention as applied to acts to acts considered apart from their purpose (*The Queen v. George,* 1960, p. 877). This definition was drawn from the distinction between motive and intent. As in many cases involving voluntary intoxication, it is important to acknowledge that the defendant must hold, what they called, "premeditated intent for future", meaning that the defendant has to be capable of

forming intent for future action, such as owning a firearm for the purpose of endangering the public in the future (Stuart, 2007, p. 251). Therefore, the person must have the knowledge of the consequences that may follow their action and have the intention to complete the act.

Generally, the defence of voluntary intoxication cannot be used as a defence, but in the case of *George*, the Court agreed with the concept that a person must hold a specific intent to commit robbery in order to be found guilty thereof. With the lack of the specific intent that has been altered by intoxication, *George* cannot be found guilty on those charges as he lacks the ability to form specific intent.

General Intent. In general intent offenses, the evidence requires that the accused intended the conduct, therefore it was not an accident or honest mistake. It is also not necessary to prove that the accused intended to cause any consequence. Most general intent offenses require a certain degree of mental element in their conduct that lead up to the doing of the wrongful act. This mental element is very important when distinguishing the difference between a specific and general intent and their classification is still unclear as it varies from one offence to another. Primarily, general intent tends to only require a minimal level of a mental state/ capability to understand and predict the consequences for their consequences. In other words, the mental element simply requires the performance of the act. This difference between general intent and specific intent has been clearly illustrated and explained by Justice Sopinka in *R. v. Tatton* as well as using the precedent of *R. v. Daviault.*

R.v. Tatton [2015]. The defendant Mr. *Tatton* was accused of causing fire of the contents of his ex-girlfriend's home while being highly intoxicated. He had placed a pan with oil on a stove, turned the burner on too high and left the house to get some coffee. When he returned, the house was on fire. Mr. *Tatton* was then charged with arson contrary to s. 434 of the Criminal Code. During his trial, Mr. *Tatton* claimed the fire had been an accident which resulted from his

intoxication. Since arson is a general intent offense, and intoxication falls short of automatism, it is not available as a defence, because the law does not allow offenders to rely on self-induced intoxication falling short of automatism as an excuse for general intent offenses. This caused the Court to re-examine the legal classification of arson in the Criminal Code, because if it is classified as specific intent offence, then Mr. *Tatton* would be able to use the defence of self - induced intoxication. However, if it rules that arson is general intent offence, then the self - induced intoxication may not be used as a defence. The Court then used the reasoning behind the R. v. *Daviault*, for the Court to re-evaluate the importance of intent and the difference between specific and general intent offences.

In *R.v Daviault* the Court decided that a person who committed a crime in a state of intoxication may not rely on drunkenness as a defence to a general intent crime. Justice Sopinka also determined two factors that help distinguish between a general and a specific intent crime: first "the nature of the mental element and its relative importance", second "the social policy sought to be attained by criminalizing the particular conduct" (*R.v. Tatton*, 2015, para, 26). Justice Sopinka further explains how general intent crimes require "the minimal intent to do the act" as such crimes only require a minimal thought and understanding therefore a person who is even extremely intoxicated still has the capacity of that mental element to commit such crimes. Sopinka concluded that allowing intoxication as a defence would only contradict the social policy underlying these crimes. Furthermore, he continues to explain the necessary mental element for specific intent offences. Sopinka held that specific intent crimes require a "heightened' mental element such as "the formation of further ulterior motives and purposes", compared to general intent that only requires a "minimal" mental state. Because specific intent offenses are more complex, therefore it requires a more complicated thought and reasoning process, which explains

how intoxication may fall short of automatism, as specific intent offenses are a type of offense hat an intoxicated person wouldn't normally commit (*R. v. Tatton,* 2015, para 27).

A more heightened mental state may actually suggest that the person has an understanding or a knowledge element of his/her circumstances and consequences. Thus, in cases of possession of stolen property, the accused must either know or be willfully blind to the fact that the goods which he is in possession of are stolen. In such cases, the offence has an ulterior purpose in which the knowledge component renders the mental element more acute and therefore making intoxication an available defence for such crimes.

Finally, in determining the legal classification of arson as a general or specific intent offence, the majority in *R. v. Tatton* (2015), held that it was a general intent offence for which intoxication falling short of automatism in not available as a defence. The reasoning behind this decision further explained that the *actus reus* in this case was the damaging of property by fire, in which the mental element is the intentional or reckless performance of the illegal act - causing the damage of the property. There was no additional knowledge or ulterior motive needed for the performance of this illegal act. There was no complex thought or reasoning process necessary that would fall under the specific intent category, thus, the level of intent for this offence would be minimal which falls under the general intent offences.

This case illustrated a great importance to the level of intent necessary for certain offences and how each are being accessed to correctly classify the level of intent and the offence to which it associates. It is also important to note the distinction made between general and specific intent offences and the different requirement of mental element within each category.

Recklessness. Unlike specific and general intent offenses, there are a few criminal offenses that would fall under the recklessness category. In this category, the evidence required to prove that an accused was reckless and must show that the accused's actions were extremely or grossly

careless or reckless and the accused was in fact aware of his actions. Recklessness has always been one of the more complex mental element to classify. It has always been on the edge between objective and subjective test of *mens rea* and only in the recent years have the courts reinterpreted recklessness subjectively rather than objectively (Amirthalingham, 2004, p. 491). According to Hutamaki (1951), reckless conduct constitutes of two elements: 1) actual knowledge that the course of conduct he is about to embark upon involves a high degree of risk to a certain consequence and; 2) a conscious decision to risk occurrence of the consequence (p. 56). If both elements are met, the accused is subject to criminal prosecution. Recklessness does not require a higher degree of intent, meaning that the person may not have intended to do the harm; however he was fully aware of his actions and consequences and was simply indifferent or reckless as to whether the harm will occur (Hutamaki, 1951, p. 57). As Amirthalingam, (2004) has explained in his article "recklessness required a positive mental state of actual awareness of both existence of the risk and of the unreasonableness of taking the risk" (p. 495).

R. v. Cunningham [1957]. Due to the fact that recklessness has been treated as both objective and subjective in the past, two major cases came into play when administering the objective or the subjective test of recklessness. In the case of *R v Cunningham* (1957), from which the subjective test was established, the defendant had broken a gas meter to steal the money in it which resulted in the gas escaping into the next-door house causing the victim to become ill and endangering her life. The defendant was charged with "maliciously administering a noxious thing so as to endanger life" under section 23 of the Offences against the Person Act 1861. The Court held that there must be proof of the defendant's "malicious" behavior and that he intended to cause the harm in question or had been reckless as to whether such harm was possible (Hasitha & Jain, 2019, p. 12). This test illustrated that recklessness is established where the accused has foreseen possible harm to another person or property but pursued to take on the risk regardless of the risk

(Crosby, 2014, p. 7). We can see how there must be evidence of the defendant being reckless in terms of his awareness of the risk that his actions might cause.

On the other hand, the second interpretation of *mens rea* using objective test with the case of *MPC v Caldwell* (1982), where the defendant got drunk and set fire to a hotel as an act of revenge against the owner. The fire was put out before any serious damage had occurred. However, *Caldwell* was convicted of damaging property with intent to endanger life or being reckless whether life would be endangered (Hasitha & Jain, 2019, p. 13). The required *mens rea* was either intent or recklessness and because he was drunk at the time of the offence, the Court held he did not have the intent but was rather reckless. The objective test mainly focused on the reasonable person standard to establish the intent of their actions, meanwhile the subjective test purely focused of the defendant's awareness of his actions and the possible risk that are associated with the offence and whether he chose to pursue the risk.

Knowledge. Knowledge is a lower degree of subjective *mens rea*, that carries with it a lower degree of culpability. There are only a few criminal offenses which require evidence that the accused had some prior knowledge or awareness while committing the *actus reus*. Knowledge is mostly used for offences related to possession of illegal substances or stolen goods (Roach, 2015, p. 194). In *Beaver v. The Queen [1957],* the Supreme Court held that a person who is in physical possession could not be said to possess that substance unless he knows the nature of that substance (Roach, 2015, p. 194). The important element of "belief" is required to determine whether the individual had the knowledge about the nature of the substance. This being said, if a person truly and honestly believes that the substance he was found in possession of was baking powder, he does not hold the necessary *mens rea* for possession, even if the powder turned out to be heroin. The knowledge degree of *mens rea* focuses primarily on the knowledge of the person in question rather than the knowledge of a reasonable person (Roach, 2015, p. 195). It is also

important to understand the two elements of knowledge - truth and belief. The truth aspect is strictly associated with the objective side of *mens rea* that is required to establish the *actus reus* of the offence. Meanwhile the belief aspect is purely of a subjective nature of *mens rea* that is required to establish the mental element - knowledge - of the person (Roach, 2015, p. 194).

Wilful Blindness. A relatively new form of subjective *mens rea* that was introduced as a substitute for knowledge. It is seen in cases where an accused subjectively sees the need to make further inquiries about a certain offence but deliberately declines to make such inquiries to avoid knowing the truth, ultimately avoid responsibility for their actions (Roach, 2015, p. 195). In the case of *Sansregret v. The Queen [1985],* the Supreme Court explained that wilful blindness is when a person becomes aware of his/her need to make necessary inquiries but refuses to do so because they do not wish to know the truth, thus remain ignorant. The justification in wilful blindness is found in the accused's own fault of deliberately refusing to make necessary inquiries when he/she knew it was needed (Roach, 2015, p. 195). The Court defines wilful blindness as "deliberately choosing not to know" which then prevents the accused from having a guilty knowledge (Roach, 2015, p.196). The Court also stated that wilful blindness is a stronger fault element of subjective *mens rea* that is distinct and greater than both negligence and recklessness.

An example illustrating cases involving wilful blindness would be a case of sexual assault, where the accused failed to inquire about consent and wilfully chose to continue with his actions. In the case of *R. v. Briscoe [2010]*, the accused had strong suspicion that the victim would be sexually assaulted and killed and told his friends "whatever you guys wanna do just do it. Don't do it around me. I don't want to see nothing." (para, 25). This example clearly illustrates how the accused was partially aware that something bad was going to happen but refused to inquire and deliberately chose not to participate. It is difficult to fairly distinguish between wilful blindness and knowledge, which is why there has to be more than just a mere suspicion of a fact to be

considered wilfully blind. The degree of suspicion must be higher to rightfully determine a person's fault element of wilful blindness.

Objective *Mens Rea*

The second approach to *mens rea* for criminal liability is objectivism, which suggests that liability should be extended to those who have committed an offence that caused harm to others regardless of whether they foresaw the risk of harm occurring, but where the reasonable person would have foreseen such risk (Crosby, 2014, p. 30). There is some controversy regarding objective test in criminal law as its approach is often over-inclusive and unjust, which in turn ends up criminalizing people who genuinely did not foresee the harm (Grist, 2019, p. 4). The mental state of the defendant does not hold much importance in cases of objective liability such as negligence. Instead, it compares the defendant's actions to the reasonable person standard. A reasonable person is an ordinary, cautious and prudent person. This standard suggests that a reasonable person would have foreseen the risk and knew not to pursue with their action.

However, it is difficult to classify a person's blameworthiness using the reasonable person standard. No person is identical and not everyone holds same beliefs, values, and morals. Thus, it is important to consider other factors that affect a person's ability to correctly demonstrate their ability to consistently deploy their judgement (Skolnik, 2017, p. 318). There are "non-chosen" factors that may negatively affect a person's mental capacity and/or their judgement. Factors like a person with low intelligence, poor motor coordination, and other traits that they were either born with or developed due to their medication or as a result of an accident. These factors are constructs of an individual's personal make-up and it is evidently not something they had chosen for themselves. Consequently, why should these individuals be held accountable and be subject to the objective test of reasonable person to identify whether they had the ability to appreciate the risk

that had occurred in their case because it was something a 'reasonable person' would have known and predicted.

There are several concerns relating to the stigma that certain offenses carry with them which will in turn rest on the accused and the fear of lack of proper justification has been raised by the courts. For these reasons, the Court avoids the application of objective *mens rea* for most offenses (Skolnik, 2017, p. 327). The second concern raised by the courts, is the notion of moral involuntariness inherent to accusatory defenses. The notion by which some situations may be excused under certain circumstances while others are not. This creates a concern among the defendants as it is not consistent with the administration of the law. Objective liability correlates with our day to day blaming practices when it does not conform with our own value and beliefs (Crosby, 2014, p. 31). We tend to compare everyone's behaviour to our own reasonable expectations of how other should behave. Which is where the objective test of a reasonable person comes from. This criterion expects everyone to act in a rational manner at all times, which is impossible considering some circumstances that may arise and considering the fact that not all people are the same.

Penal Negligence. For many decades, the Supreme Court has developed numerous degrees of negligence that falls under the objective liability standard. The highest and most important degree of negligence is the one of criminal negligence. Criminal negligence is different from other forms of subjective *mens rea* and the required mental element may be of a lower degree yet still very significant. As Fletcher, G. (1971) stated "awareness or foresight of consequences is a necessary condition for satisfying *actus non facit reum nisi mens sit rea*" (p. 410). Meaning awareness and foresight may not be intent but it is also a form of *mens rea* which is a necessary element of a crime. In other words, there cannot be a crime without the act and a mental element fulfilling the act. It is why negligence is subject to an objective standard of *mens rea* rather than

subjective. The objective standard in criminal cases I Canada is that the accused's actions are a "marked departure" from what a reasonable person would do. Because it is a lower standard of *mens rea* that only requires a mental state which a reasonable and prudent person would have in the same circumstances. As McIntyre J. stated in *R. v. Tutton* [1989] that criminal negligence requires "proof of conduct which reveals a marked and significant departure from the standard which could be expected for a reasonably prudent person in the circumstances" (Roach, 2015, p. 205). Which indicates that a person will engage in dangerous behaviour or activity that a reasonable person would have foreseen in their circumstances, yet they still chose to proceed with their actions.

At first, cases that now fall under negligence were considered to be absolute responsibility offenses where *mens rea* is not required in the essence to illustrate the degree of responsibility that the defendant holds. In other words, in absolute responsibility cases, the degree of blameworthiness an offense presents is irrelevant in Court. The act itself is of relevance to the Court (Stuart, 2007, p. 179). The idea behind strict responsibility was to promote administrative efficiency, such as decreasing the time and money placed on prosecution and to prevent the defendants from carrying the burden of a stigma attached to their crimes (Stuart, 2007, p. 179). In general, these offenses were minor and carried with them low penalties. Therefore, by enforcing the proof of a mental element in these offences would only make the prosecution's more costly, time inefficient, stricter penalties, and the defendants would have to carry the burden of stigma attached to the offense. However, the interpretation of criminal negligence went beyond absolute responsibility and found that negligence is another form of a lower standard of mental element of an offence. As many theorists of common law have explained, criminal negligence still requires some form of a mental element of *mens rea* for a person to be held accountable and be punished

(Fletcher, 1971, p. 411). Hence the maxim *actus non facit reum nisi mens sit rea,* where there can only be a crime where there is both *actus reus* and *mens rea*.

Sault Ste. Marie [1978]. A famous case involving issues of public welfare where the city of Sault Ste Marie hired Cherokee Disposal to dispose of the city's waste and all the waste that was disposed of ended up in a stream resulting in the pollution of public waterways. The issue was whether the case was subject to strict liability offence and what is the standard of *mens rea* for public offences. The Supreme Court recognized three types of offences. First are true crimes, which are subject to *mens rea* standard and require elements like 'knowingly', 'wilfully' or 'intentionally' and the defendant is presumed innocent. Second are absolute liability offences where the act alone is punishable and it does not require to prove *mens rea* and are prima facie presumption of negligence on accused. These are regulatory (public welfare) offences that do not offer a defence because they are minor and excusable with a fine. Last type of offence is strict liability, which is similar to absolute liability since both do not require proof of mens rea and the act alone is punishable. However, they have the due diligence defence in which the defendant has the burden to prove that they took all reasonable measure to prevent a particular event to occur. The Court then held that this case was not a true crime and absolute liability is the most efficient way to deal with regulatory offences but it violates the principles of fundamental penal liability. Absolute liability may solve the issue but on the other hand there is risk of punishing the morally wrong since there is no evidence the hat a higher standard of care results from absolute liability (Nowakowska, 2015). The Court then applied strict liability to this case as it is the halfway house between true crimes and absolute liability.

As explained previously and following the decision in the case of *Sault Ste. Marie* (1978), Dickson explained that there is no truly criminal offense without the presence of a mental element. He found that absolute liability for offenses had violated the principles of fundamental penal

liability, which is what we refer to as *mens rea* requirement (Stuart, 2007, p.179). The violation of the principles of fundamental penal liability by punishing the morally innocent for an offence without any evidence on whether there were precautionary measures taken to prevent an event from occurring forced the courts to look into the mental element necessary for regulatory offences. Absolute liability does not require the proof of *mens rea* nor does it allow the defendant to have a defence, which is a violation of principles of fundamental justice where everyone has a right to a fair trial which includes a proper defence. Although, the objective standard *mens rea* may be similar to the strict responsibility standard from the past as it's based on the reasonable person standard. However, it gives rise to a defence and it examines the mental state of a person and their circumstances at the time of the offence and the mental element that is necessary for a person to be accountable for their conduct. Since Sault Ste. Marie (1978), *mens rea* has become a requirement for all matters even those that were believed to be a concern of public welfare - in the case of *Sault Ste. Marie* was the pollution and debris that resulted from a discharge of deleterious materials into the creek - still remains a criminal matter under negligence that requires proof of fault, therefore *mens rea* requirement is necessary.

Legal Defenses

As discussed earlier in this paper, the principles of fundamental justice dictate that no morally innocent person should be imprisoned as a result of a criminal offence as it would be a violation of their fundamental rights. Therefore, the Court has to be meticulous in all criminal prosecutions especially when it comes to establishing their fault in relation to *mens rea*. Apart from taking into account all relevant factors to the case, there are criminal defences available to each defendant that would aid in supporting the lack of the fault element illustrated by the presence of *mens rea.* As we know, every person has to right to a fair representation in Court. Part of that fairness is the ability to advance a defence for which the accused carries the burden to prove

beyond reasonable doubt. There are numerous criminal defenses, but we will focus on three common defenses in Canadian criminal law - necessity, mistake of fact, and Not Criminally Responsible on Account of Mental Disorder.

Necessity

A situation where a person is subject to breaking the law as a necessity of either self-preservation or as a result of a threat to their live or the lives of others falls under necessity in *mens rea* defences. As Roach, (2009) writes, historically the courts were reluctant to recognize necessity as a defense, as it is caused by dire circumstances of peril can be viewed as an excuse or a justification (p. 311). Many cases were brought up raising the defence of necessity in which the courts found difficult to define, until the case of *Perka* (1984), where Justice Dickson developed three major criteria in raising a proper defence of necessity; (i) the presence of "circumstances of imminent risk where the action was taken to avoid a direct and immediate peril", (ii) the act must be "inevitable, unavoidable, and afford no reasonable opportunity for an alternative course of action that does not involve a breach of law", and (iii) the "harm inflicted must be less than the harm sought to be avoided" (Stuart, 2007, p. 538). Two additional major cases were brought to Court with the issue of necessity in the case of *R. v. Morgentaler* (1993) and R. v, *Latimer* (2001). Both cases have been subject to the three criteria of necessity that were introduced in *Perka,* and both cases failed all three criteria which resulted in the courts re-evaluation of these criteria.

R. v. Morgentaler [1993]. Two other major cases have also contributed in the interpretation of the defense of necessity. In the first case of *R.v. Morgentaler [1993]*, where a medical doctor was charged for illegally performing abortions in his private clinics contrary to the former s. 423(1) and 251(1) of the *Criminal Code*. This case became a controversial scenario in the elaboration of the defence of necessity as in some cases where abortion was performed, there was no evidence of imminent peril or danger to the carrier of the child. An example of imminent peril or danger would

be the termination of pregnancy because it endangered the woman's life (Stuart, 2007, p. 539). The Court then assessed the three criteria that were introduced in *Perka* finding that they do not apply to *Morgentaler* and failed their defence of necessity. The Court suggested that the law which prohibited the procurement of abortions was unethical and in violation of *Charter* rights. As personal autonomy being one of the major principles of fundamental justice and *Charter* rights, it was found to be unconstitutional to disallow the procedure - abortion - as an act to preserve the woman's life and allow her to make her own decisions in relation to her body. The abortion provisions were then found unconstitutional causing the abortion law to be taken down.

R. v. Latimer [2001]. The second case involving necessity as a defence receiving a lot of attention was the case of *Latimer* (2001). In this case, a father facilitated the death of his 12-year old daughter Tracy who was suffering from a severe form of cerebral palsy. Her brain development has only reached the one of a four-year-old child, causing her to be completely dependent of others (Stuart, 2007, p. 542). Due to her medical condition, she was presumed to be in a great deal of pain which could not be reduced using medication as it would interfere with her epileptic medication. *Latimer's* daughter was expected to have another surgery, but the family refused and *Latimer* decided to take his daughter's life. The next day, when the rest of the family was away, he put his daughter in the truck and inserted a exhaust pipe into the truck causing her death by carbon monoxide poisoning (Stuart, 2007, p. 543). *Latimer* was charged with first degree murder of his daughter.

This case articulated three important elements of necessity; 1) the requirement of peril or danger, 2) the requirement of no reasonable legal alternative, and 3) the requirement of proportionality between the harm inflicted and the harm avoided. The Court held that the defence of necessity did not apply to this case, because it failed in all three criteria to raise the defence of necessity as outlined by Justice Dickson in the case of *Perka.* There was no evidence of peril or

danger to his daughter's life, there were alternatives available, and the hard done was greater than the harm avoided (Roach, 2009, p. 314). This case was a difficult one and raised significant controversy in the subject of mercy killing, euthanasia, and assisted suicide and the defence of necessity in cases of homicide. The Court clearly stated that in the case of *Latimer*, he received a strict punishment that was considered to be fair and just for taking the life of a vulnerable person without their consent.

The controversy with this case is mainly due to the fact that *Latimer's* intentions were not malicious when taking his daughter's life, but the Court regarded at it from a different angle, in respect to not only *Latimer* and his actions, but also considering the life of his daughter and balancing each factor on a scale.

Mistake of Fact

As discussed earlier, any criminal offence carries with it a specific punishment and a stigma that is defined not only by its conduct (*actus reus*) but also the mental element *(mens rea*) like fault, intent, blameworthiness and culpability. These mental elements are generally represented by a person's knowledge, purpose, or a genuine mistake in belief (Cavallaro, 1996, p. 817). In the defence of mistake of fact, two main elements are important, the knowledge of a person and/or lack thereof, and a genuine mistake in belief. The concept of a genuine belief comes from the subjective belief that the belief must be reasonable (Christopher, 1994, para. 109). Christopher explains that if "the actor's belief is mistaken and recklessly or negligently formed", he cannot raise the defence of mistake of fact and he will be prosecuted under negligence or recklessness (Christopher, 1994, para. 109).

The *mens rea* defence of mistake of fact first emerged as a defence in a case of rape charge in 1964 (Cavallaro, 1996, p. 815). Essentially, the defence of mistake of fact is seen more as a disproving factor by demonstrating that there was a true lack of the necessary mental element that

is necessary when convicting a person of a crime. Without the mental element, they cannot be held responsible for the wrongful conduct (Cavallaro, 1996, p. 818). The defence of mistake of fact or mistaken belief gives rise to the burden of a reasonable doubt in Court from which the prosecution has more difficulty to disprove the defence beyond a reasonable doubt (Cavallaro, 1996, p. 818).

The defence of mistake of fact is mostly raised in offences involving sexual assault charges. Sexual assault is defined as "as sexual intercourse accomplished by force and without consent, an actor must have a level of intent that is at least reckless and, more often, either purposeful or knowing" (Cavallaro, 1996), which requires a mental state of knowledge of consent accompanying the sexual conduct and force of conduct. Meaning that the defendant must be aware of the fact that the victim had not given consent or withdrew his/her consent later while the sexual conduct was occurring, and a certain degree of force has been applied. If the defendant had mistakenly believed that the victim had consented to the sexual conduct, the defendant may be able to raise the defence of mistake of fact.

***The People v. Hernandez* [1964].** In the United States Supreme Court case of *People v. Hernandez* (1964), from the Supreme Court of America, the issue was not in relation to consent of the victim, rather the age. It was a case of statutory rape, in which the defendant had sexual intercourse with the complainant who turned out to be under age. Prior to this case, criminal cases involving sexual conduct with minors have been dealt with in a strict liability manner. However, in *Hernandez* (1964), the United States Supreme Court reversed their first ruling of strict liability to admit the evidence of the defendant showing he had a good faith and a reasonable belief that the complainant was over eighteen years of age (Cavallaro, 1996, p. 820).

Although *Hernandez* truly believed the complainant had given him consent, he was still charged with statutory rape, having age as the main element that disapproves rightful consent. In a case where a minor is the complainant, the age serves as a proxy to the consent, which makes

consent invalid due to the fact that minors are incapable of giving valid consent. The Court regarded the correlation between age and legal consent and applied the principles of fundamental justice in which it is instructed that a conduct cannot be wrongful if the actor lacked the necessary mental element. In this case, the Court believed the defendant acted in good faith with a reasonable and genuine belief that the complainant was of legal age to consent, therefore the Court permitted mistake to actual consent as a valid defence (Cavallaro, 1996, p. 822).

***People v. Williams* [1969].** Another United States Supreme Court case raising the defence of mistake of fact was the one of *People v. Williams* (1969), from which the Court decisions adopted the rule of equivocality in terms of consent. In this case, the complainant testified saying she had been raped by the defendant and had never given consent to sexual conduct, contrary to the defendant's testimony where he stated that she was the one making advances in the hotel room and after sexual intercourse she asked him to pay her, but he refused. That is when she threatened him to create a problem for him by telling everyone what happened. The defendant claimed he believed she had given consent and from his testimony where he explained the events from that night, the Court held that there was substantial evidence and his testimony supports the defence of mistake of fact (Cavallaro, 1996, p. 834). The Supreme Court held that the defence is unavailable unless there is "substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not" (Cavallaro, 1996, p. 832). The defendant's burden may be satisfied only by evidence of "the victim's equivocal conduct on the basis of which [the defendant] erroneously believed there was consent (Cavallaro, 1996, p. 834).

These statements by the Court enforce the equivocality of the defendant's circumstance in relation to their genuine belief of obtaining consent where there was none. This enforces the defendants in future cases to provide the courts with more evidence of the circumstance than just

proof of their erroneous belief that there was consent. The defendant must demonstrate that in their situation, at that time, they believed that certain factors that lead up to the event of sexual conduct with another person were demonstrative of actual consent causing them to truly and in good faith believe that there was consent. This analysis is of the essence in such cases as it is important to see the level of understanding of the defendant on their knowledge about consent to properly assess their ability to distinguish between what is and what is not consent. If the defendant simply does not understand what consent is and claims to have been mistaken for obtaining one, then his defence of mistake of fact will be found invalid in Court because he does not have the minimal understanding and knowledge about actual consent to develop a mistaken belief on consent.

Not Criminally Responsible on Account of Mental Disorder

One of the more contentious *mens rea* defences in Canadian criminal law is NCRMD. It has been used in some of the more serious and gruesome cases in Canadian history. Due to the burden and stigma it carries with it, the NCRMD defence is a complex one and it only applies to certain scenarios involving people with a unique state of mind that would potentially explain their conduct.

Legal Definition. In Canadian justice, the principles of fundamental justice find it inappropriate to punish people who did not have the criminal intent or a guilty mind when committing a criminal offense. Section 7 of the Charter of Rights and Freedoms serves to protect "everyone's right to life, liberty, and security and the right not to be deprived of thereof except in accordance with principles of fundamental justice" thus, if a person will be imprisoned for a crime they committed but did not have form intent or were aware of their actions, it will be in violation of section 7 of Charter as it violates a person's right to life, liberty, and security once they are incarcerated. Therefore, the Federal Government had to put legislation into place that would protect people who are suffering from severe mental disorders from being incarcerated or punished

the same way they would punish a criminal with a healthy mind. This legislation, once known as the "insanity defense", is now a *mens rea* defence of Not Criminally Responsible on account of Mental Disorder. Section 16 of the *Criminal Code* defines the verdict of NCRMD as "No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong". Ultimately the courts have implemented this legislation to reduce recidivism rates of people who are suffering from a mental disorder by providing them with proper care without having them endure the prison system. As previous research has shown that many mentally-ill individuals will continue to commit crimes if they do not receive an appropriate treatment for their disorder as it is the primary cause of their criminal behavior (Kachulis, 2017, p. 358). Effectively, as illustrated by Statistics Canada (2014) the implementation of the NCRMD defense into our court system has significantly aided in decreasing recidivism rates amongst the mentally ill and assist those in need with a proper treatment plan.

Mental Disorders. In order to understand the importance of the notion of NCRMD as a defense, it is crucial to have a good understanding of what constitutes as mental disorders and how do experts determine and classify them. Firstly, the American Psychiatric Association describes mental disorders as "clinically significant behavioural or psychological syndrome or pattern that occurs in an individual that is associated with present distress, disability, or may increase significantly their risk of suffering death, pain, disability, or an important loss of freedom" (Morse, 2011, para. 6). Secondly, according to the *Oxford Textbook of Psychiatry* ''most psychiatrists begin by separating mental handicap and personality disorder from mental illness... they diagnose mental illness if there are delusions, hallucinations, severe alterations of mood, or other major disturbances of psychological functions" (as cited in McSherry, 2003, p. 586).

Contemporary psychology uses and defines mental illness as a "disturbance or defect to a substantially disabling degree" (McSherry, 2003, p. 587). This defect or disturbance affects their comprehension, perceptual interpretation, reasoning, learning, judgement, memory, motivation or emotion (McSherry, 2003, p. 587), suggesting that a mental disorder can be a significant dysfunction of at least one of these areas of brain function affecting their day to day life.

Ultimately, if a person's mental dysfunction prevents him or her from forming *mens rea* and the capacity to appreciate the nature and quality of the act, which involves more than knowledge of the act, should not be held accountable for their actions due to their dysfunction. As explained in Roach, (2015), "knowledge and appreciation of the nature and quality of the act is being capable of measuring and foreseeing the consequence of the act" (p. 303). As found in *R. v. Chaulk* (1990), the Supreme Court of Canada has ruled that NCRMD evidence must show they are aware that what they were doing was morally wrong and be able to appreciate the nature of the physical act and understand that there will be consequences to their actions.

***Mens Rea* in the NCRMD Defense.** The fault element or the *mens rea* is a main element in the conviction of a person. When the *mens rea* has been proven in Court, it instructs the Court that the crime was morally blameworthy. However, *mens rea* has to be proven beyond a reasonable doubt (Sharpe & Roach, 2017).

Mens rea is often hard to prove in a court of law. The components of *mens rea* (responsibility, with its elements of intent, motive, deliberation, and volition) reflect the aims of criminal law (Gambino, 1968, p.151). Before labeling a person as a criminal, the court must prove that the person either intended, or at least had foreseen the forbidden act (Sharpe & Roach, 2017, p.296). To prove beyond a reasonable doubt, the Court must assess all evidence. When the accused claims to be suffering from a mental disorder, the Court must take it into consideration to determine whether the mental disorder is valid and if it had any significant impact on the accused's mental

state at the time. If so, does that mental disorder impede on the formation of *mens rea* or "intent or guilty mind"? Without proof beyond reasonable doubt that the person had the fault element, the court cannot convict anyone of a criminal charge.

Risks when Raising the NCRMD Defense. When raising the defence of NCRM in Supreme Court, the case is then sent to a Review Board where by law they will have to consider factors relevant to risk to public safety and the needs of the accused, before rendering a disposition (Crocker, Braithwaite, Cote, Nicholl, Seto, 2011, p. 294). Therefore, the accused is subject to a thorough review before receiving a disposition and be found not criminally responsible on account of mental disorder. This allows the Court to efficiently evaluate all factors and come up with a disposition that will protect the society and the needs of the accused. Canadian court allow not only the defendant to raise the defense, but in certain circumstances, the prosecutor may also raise the defense when they see necessary.

However, the burden of proof rests with the party that raised the defense, which in other terms means that the party must prove beyond the reasonable doubt, using evidence, that the defendant should be found not criminally responsible on account of mental disorder (Roach, 2015, p. 288). This may present some risks in cases where the defendant chose not to raise the defense, but the prosecution found it necessary and raised the defense. It also creates a burden for the court to prove their case using evidence and could be subject to a NCRMD verdict when he wanted to either plead guilty or contest their innocence in the case (Roach, 2015, p. 288). Conclusively, the risk of raising a defence is the risk of carrying the burden of proof that rests upon the party who raised it and the risk of having to receive a disposition that may favor the interest of a society more than the needs and interest of the accused, like whether the accused should be detained or released (Crocker, et al., 2011, p. 299).

In the case of *R. v. Owen* (2003), where the accused was found to be not criminally responsible on account of mental disorder for the offence of second degree murder. His disposition included detention in mental health facilities and then gradual release into the community. Although, due to his substance abuse, *Owen* continued to engage in violent behavior and the mental health facility refused to support his conditional discharge as he posed a risk to others in the facility. However, under s. 672.54 of the Criminal Code, the Board's disposition must be the least onerous and least restrictive to the accused, having regard to (1) the need to protect the public from dangerous persons, (2) the mental condition of the accused, (3) the reintegration of the accused into society and (4) the other needs of the accused (Criminal Code of Canada, 1985).

The Supreme Court then demanded the Review Board to make findings of facts regarding past events that may contribute to the disposition by 'predicting future risk of harm' (Crocker, Seto, Nicholls, & Cote, 2013, p. 7). This case clearly illustrated the challenges that the Court have to recognize in terms of balancing individual liberties against public interest (Crocker, et al., 2013, p. 7).

Analysis

The purpose of this paper was to illustrate some important concepts in criminal law and their functions by focusing on the meaning of *mens rea.* The distinction between criminal and civil law lies within those meaningful concepts and their interpretation. Civil law being more direct and specific in its role, while criminal law being more broad and complex concept that requires significantly more knowledge and understanding of various concepts and the ability to correctly incorporate those concepts in the Court of law.

Civil Law

Refers to civil cases only, meaning one entity against another, or a dispute against a person, a private party, or public party. Generally, guidelines for such disputes can be found in documents

like civil contracts, public legislations and tort laws. A person subject to civil law regulations is subject to civil liability. Meaning the person who is subject to civil disputes and resolutions carries the burden of proof which lies on the balance of probability. In civil law, liability lies within the degree of negligent harm caused by one person to another. Cases involving civil law can be significant but do not carry with them the same degree of blameworthiness or have a stigma attached to their dispute. It is more so a matter of resolving private matters with another party for things like compensations for a breach of a contract. Some of these cases don't even reach the Court of law as they are resolvable between the two parties.

Criminal Law

In criminal law, it is a matter of a person against the state or Federal Government. These types of offences carry with them a significant amount of blameworthiness, depending on the degree of harm that was caused to the society, and also carry a stigma that is attached to each crime. Criminal liability lies within the mental element of the offender that was necessary to commit the offence and the severity of a crime. There is a tremendous amount of social pressure on the Court's interpretation of *mens rea* and its requirements in terms of the offence and the offender. The stronger the blameworthiness, the heavier the weight of the burden of proof that the prosecution and defendant must prove beyond a reasonable doubt. There are many factors that play significant roles in the determination of guilt of a person.

The presence of a mental element in a criminal offence is necessary for the prosecution and for the offender to be held liable for his conduct. The main distinction between civil and criminal law is found within the concept of the mental element. In civil law, there is no need for a mental element to be present, which means that a civil matter mainly focuses on the act itself, therefore does not carry with it significant moral blameworthiness. The degree of culpability in civil matter

is lower as is the social stigma. These issues are generally resolved quickly, discreetly, and without the involvement of the public because these are generally private matters.

The Burden of Proof

To better understand the differences between civil law and criminal law, it is important to examine each concept separately and their function in either civil or criminal law. In terms of burden of proof in criminal law, it carries a much higher standard of proof that must be "beyond a reasonable doubt". Meaning that guilt should be established unanimously, with no doubt. This also suggests that the defence's main focus is to raise a reasonable doubt that would derail the Court from establishing their guilt. The burden is the responsibility of one party to carry the burden of proof - primarily the prosecution - to prove the guilt or innocence of the accused (Fletcher, 1998, p. 15). It is the responsibility of persuading the judge or the jury on a particular issue. For instance, when a defendant raises a defence, he is automatically responsible introducing reasonable doubt to the court, therefore he carries the burden of proof.

In cases with civil disputes, the burden of proof has a much lower standard of proof such as "the preponderance of the evidence" which is based on the more convincing evidence with higher probability and accuracy. The jury or the judge will hear both parties and decide whose evidence was more convincing than the other. This standard of proof requires the showing that the fact is probably more true than false (Fletcher, 1998, p. 16). Sometimes, in civil cases, the standard of proof may also be "by clear and convincing evidence" which is similar to the "preponderance of the evidence standard. Which also means that the party with the most clear and convincing evidence will win the case.

Punishment

In criminal law, it is important to acknowledge that a crime is harm that was done against our society, not just one person. Therefore, it holds a greater degree of culpability and blame. For

those reasons, the punishment for criminal offenses are more severe. There are two main principles or purposes of criminal punishment. The first one being social protection, since the harm being done threatens society as a whole, the punishment for those offences act as a protection of our society (Fletcher, 1998, p. 31). The second purpose of criminal punishment is "to atone or expiate a crime that has disturbed the moral order" (Fletcher, 1998, p. 31). Once again, the mention of morality or society and the crime. A crime was always referred to as a conduct that does not depict the moral norms of a society. If a person's conduct is believed to be morally wrong and is not accepted by our society, then this conduct and the person will be subject to moral blameworthiness and stigmatisation for their conduct. Once again, we see the correlation between conduct and morality or a mental element of a conduct. In criminal law, we look both at the conduct and at the mental state of the person responsible for wrongful conduct. That is what distinguishes it from civil law. It is also why criminal punishment is always greater than a civil matter. In criminal law, punishment varies from the severity of crime and the degree of culpability a person holds. The greater the harm to society, the greater the stigma and moral blameworthiness, hence a stricter punishment. It varies from fines, to community service, to life incarceration without parole. Now we can see that there is meaning in every degree of harm. Each have their own consequences, and each serve as a lesson to the rest of the society as an example of what a person should expect when engaging in certain conduct. It is also important to note that it is not the goal or purpose of criminal law to punish and incarcerate people. It is quite the opposite. It is to remind the society that the justice system will protect them from those who do wrong and by punishing those who've harmed our society, the purpose of criminal law is to teach the rest that they should not engage in certain conduct as it will result in punishment.

On the other hand, punishments for any civil matters are less serious, primarily because they are private in context and carry with them low if any blame at all. The harm that was done

was from one person to another or one entity to another. Therefore, these matters do not entail serious punishments like in criminal law like imprisonment. Generally speaking, punishments are in a form of a compensation, injunctions or fines for the harm that was done to another party or the state (Fletcher, 1998, p. 33).

Stigma

Our society defines stigma as a mark of shame, disgrace, or disapproval that is attached to certain crimes. There is a great distinction between criminal and civil matter when it comes to the stigma attached to the civil or criminal offence. In some instances, civil offences or disputes may not even have a social stigma attached to them. Although in cases involving criminal offences, there is a stigma attached to each type of offence and is then transferred to the person who is accused of such offence. As discussed earlier in this paper, each offence holds a different degree of blame hence it carries with it a different degree of stigma as well. In criminal law, criminal offences cause a greater harm to the society hence why they carry a greater stigma. A stigma could also be defined as a label given to another person for a crime they have committed since they are subject to various types of discrimination. For instance, a person who has been convicted of theft will be labelled as a thief by his/her community, or a teenager who was accused of non consensual sexual activity with another will carry the stigma of a rapist for a very long time. There is a label for every offence which is why it is important for the courts to properly assess cases so that innocent people don't become victims of such labels and carry the burden of a stigma for something they did not do.

The Requirement of a Mental Element (*Mens Rea*)

The most important distinction between civil and criminal law is the concept of the necessary mental element for a crime. In civil law, it is not necessary to prove that the person intended or had some mental element present when committing the unlawful conduct. With the

'preponderance of evidence' standard it is simply required to provide strong, concise, and convincing evidence that would support your case. In criminal cases, we must go beyond the standard of civil matters and into more depth of a person's mental elements that come with the act. The degree of *mens rea* required for an offence varies, therefore the courts must consider every factor into their decision to correctly determine a decision. As the maxim *actus non facit reum nisi mens sit rea* says, there is no crime without a mental element, meaning a person cannot be charged with an offence if he/she was morally innocent. Hence why it is important to establish a person's guilt, intent, or fault element before administering a punishment for their act. Because, unlike in civil law where the act alone can be punishable, in criminal law an act cannot be criminal unless it has both the act and the mental element complimenting it.

Ultimately, all these elements that distinguish civil law from criminal law lead to one conclusion. In criminal law there is a higher threshold of burden of proof – beyond a reasonable doubt – that seeks to prove intent in the commission on a criminal act. The complexity behind the standards of proof which make it harder for the prosecution to convict, are here as a safeguard to ensure no morally innocent person is being punished, thus to prevent wrongful convictions. This principle is built around the axiom of *Sir William Blackstone* (1765) where he says it is better for ten guilty men go free, then one innocent man be wrongfully convicted.

Conclusion

The meaning of *mens rea* in criminal law is a very complex and important concept that is subject to different interpretations for different offences and different circumstances. For centuries the courts along with the church and the government have attempted to define and interpret *mens rea* in criminal law. With each new discovery of either the meaning or the purpose of this complex concept, the courts have set out the basics of our criminal law. With all that encompasses criminal law, it is still not definitive in any way as each law is subject to a different interpretation, changes,

or even possible removal of therein. Nothing is definitive in criminal law, except for its structure and for its purpose, to protect the society, to teach the society of the consequences of each wrongful conduct, to hold accountable those who disrespect the law and to protect the morally innocent from wrongful punishment. Within such a broad concept of criminal law lies another very important and powerful aspect that is the foundation of criminal law – *mens rea.* This one aspect has challenged the law and the courts throughout centuries to establish a more profound understanding of the law and what it encompasses.

Mens rea is the required mental element that is necessary in determining a person's guilt, fault, or intent of a conduct they engaged in. With each new case brought into Court for the past century, the Court has discovered and established new forms of *mens rea* that aid in correctly assessing the law using a specific form for each conduct that requires a different mental element and results in a different punishment. With each offence there is a different degree of blame and stigma attached. Within each offence, there are available defences that are also based on a different form of *mens rea* that supports each defence. There is no other form of law that is so complex which is why criminal cases take much longer to process in Court and have such high standards of burden of proof. As a whole, *mens rea* is just one element in criminal law that is so powerful that it essentially dictates how to assess and interpret the law. Through history, each law has been consistently subject to four main elements; *actus reus, mens rea*, presumption of innocence and proof beyond a reasonable doubt. Although law itself is always subject to change, its structure and foundation remains consistent throughout centuries that dictate how the law should be interpreted.

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